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March 26, 1999

BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Communication Regarding Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54

Dear Ms. Salas:

Yesterday, on behalf of the Telecommunications Resellers Association ("TRA"), the undersigned of Hogan and Hartson L.L.P.and David Gusky, Executive Vice President, TRA, met with Thomas Sugrue, Chief, Wireless Telecommunications Bureau; Diane Cornell, Deputy Chief, Wireless Telecommunications Bureau; and Nancy Boocker and Walter Strack of the Wireless Telecommunications Bureau regarding the referenced proceedings.

In the meeting, TRA discussed its position regarding the importance of unrestricted wireless resale to a competitive wireless and full service market. TRA also discussed the importance of Commission enforcement of the current resale obligation and the need to eliminate any sunset of the resale requirement.

The attached handout was distributed and discussed at the meeting. The handout explains why the Commission should retain its requirement that carriers permit resale of bundled packages of wireless service and equipment. TRA also discussed the points made in the November 13, 1998, letter to Chairman William Kennard from David Gusky of TRA filed in the referenced docket.

TRA also distributed and discussed the enclosed reply comments of the Personal Communications Industry Association (PCIA) in WT Docket No. 98-205, et al., filed Feb. 10, 1999, which we hereby file for inclusion in the record of the referenced proceeding (CC Docket No.94--54). In its reply comments, PCIA opposed the lifting of the commercial mobile radio services spectrum cap. PCIA cited data showing that the PCS

share of the wireless market is still relatively low. This data shows that the FCC's decision to sunset the wireless resale requirement, which was based on predictions of the effect of the introduction of PCS on the competitiveness of the wireless market, was not well-founded. For this reason and the reasons given in the reconsideration petition of the National Wireless Resellers Association in the referenced proceeding, TRA urges the Commission to lift the sunset of the resale rule.

I have hereby submitted two copies of this notice for each of the referenced proceedings to the Secretary, as required by the Commission's rules. Please return a date-stamped copy of the enclosed (copy provided).

Please contact the undersigned if you have any questions.

Respectfully submitted,

Linda L. Oliver
Counsel for Telecommunications
Resellers Association

Enclosures

cc: Thomas Sugrue
Diane Cornell
Nancy Boocker
Walter Strack

Telecommunications Resellers Association

March, 1999
CC Docket No. 94-54

Why Resale of Bundled Offerings of CPE and Wireless Service Must Remain Unrestricted

The Commission correctly held in the CMRS Resale Order that carriers should not be allowed to circumvent the resale requirement by denying resellers the ability to resell a package of wireless service and equipment. 1/

Under the resale rule, 47 C.F.R.§ 20.12(b), resellers are entitled to "unrestricted resale" of any CMRS service, including services that are discounted through bundled offerings.

Denying reseller customers the ability to purchase a bundled offering constitutes the denial of a reasonable request for service in violation of Section 201(b) and constitutes discrimination against reseller customers in violation of Section 202(a). 47 U.S.C. §§ 201(b), 202(a).

1/ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263, released July 12, 1996, at ¶ 31, 11 FCC Rcd 18455 (1996).

Communications services increasingly are being sold in bundle-priced packages with other products, some of which may not themselves be subject to Title II. 2/

Standard practice in the wireless industry is to sell wireless phones at deeply discounted rates when the phones are purchased with wireless service. 3/

- This practice, while permitted under FCC rules for wireless services, enables the carrier effectively to discount the *service* when it is sold in a bundle with equipment.

- The bundled price *disguises* the discounting of the service price.

2/ See, e.g., "Bundling Still a Mixed Bag," RCR, Jan. 18, 1999. Bundled pricing is commonly defined as offering of two or more products at a packaged rate that is lower than the price that would be paid if the components were purchased separately. See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket Nos. 96-61, 98-163, FCC 98-258, released October 9, 1998, at ¶ 1.

3/ Except in the case of wireless services, it is still unlawful to bundle telecommunications services with equipment. The Commission is considering whether to eliminate the general prohibition on bundling of common carrier services with CPE and enhanced services. See id.

This discounted wireless service should be available for resale, through *resale of the bundle.*

Or, if the carrier prefers, the discounted service can be provided by offering resellers service (without CPE) *at the effective discount* reflected in the bundled offering.

The fact that CPE standing alone is not a Title II offering, or that CPE is competitive, is irrelevant to whether the bundle should be available to resellers.

- In the CMRS Resale Order, the Commission did *not* hold that the non-common carrier products themselves must be available for resale.

- Resellers are like any other customer, and cannot lawfully be denied the ability to purchase service, whether it is offered on a stand-alone basis or bundled with CPE.

- Carriers cannot use bundling as an excuse to discriminate against resellers.

The fact that a reseller may be able to purchase the CPE from another source also is irrelevant to the requirement to permit resale of the bundle.

- The problem with bundling is not the lack of availability of CPE.

- Rather, the issue is that wireless service is being effectively discounted through the bundle, and that service discount is not available to reseller customers.

The Commission did not prohibit bundling of wireless service with CPE; it only required carriers to refrain from denying resellers the ability to purchase bundled as well as stand-alone service offerings.

The Commission simply was recognizing that when a Title II common carrier service is bundled with a non-Title II offering, carriers can employ the bundled pricing as a means of denying to resellers the most favorable retail rate.

The implications of eliminating the requirement that bundles be made available for resale would be profound.

Full service packages are likely to become the rule in the marketplace.

- By definition, the components of the package will be more expensive, standing alone, than they will be when purchased as a bundle.

- Thus, the lowest effective rates for service will be those available in bundled offerings.

- If those bundles are not available for resale, resellers will be left with the ability only to resell the highest priced, least discounted offerings.

If resale becomes nonviable as a practical matter, then only those service providers that own networks will be in a position to compete in a full service world.

Telecommunications Resellers Association
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November 13, 1998

BY HAND DELIVERY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Re: Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54

Dear Chairman Kennard:

I am writing on behalf of the Telecommunications Resellers Association ("TRA") regarding the pending petitions for reconsideration in the referenced proceeding. The pending petitions seek reconsideration of the Commission's July 1996 decision to apply a resale requirement to all CMRS providers and to sunset that requirement five years after initial PCS licensing is completed. 1/

TRA strongly supports the Commission's decision to apply to all broadband CMRS providers the Commission's long-standing policy requiring unrestricted resale. TRA is concerned, however, that the Commission's decision to sunset that requirement (effective November 24, 2002) will have a serious adverse impact on competition and consumer choice in both the wireless market and on the market for telecommunications services generally.

1/ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, CC Docket No. 94-54, 11 FCC Rcd 18455, FCC 96-23, released July 12, 1996 ("CMRS Resale Order").

For the reasons discussed in the petition for reconsideration filed by the National Wireless Resellers Association ("NWRA") and in this letter, TRA urges the Commission to reconsider its decision to sunset its wireless resale policy. 2/

In the event the Commission decides to reaffirm its decision to adopt a sunset provision, the Commission should expressly provide in its reconsideration order that (1) the resale rule requires facilities-based carriers to provide resellers with resale agreements and, if they have the capability, electronic billing data; (2) the state of competition in the wireless industry will be reexamined before any sunset takes place; and (3) existing wireless resale customers will be protected from losing service if and when a sunset does occur.

I. The Benefits of Unrestricted Wireless Resale

The Commission has often recognized the many benefits of unrestricted wireless resale. 3/ They include:

> Price and Service Competition: Wireless resellers create price competition by buying at volume discounted prices and reselling to smaller customers. Because they can offer the services of any underlying carrier, resellers can shop around for the best prices on behalf of their customers.
>
> Full Service Competition: Wireless resale is essential to promoting a competitive wireless market, and to ensuring a competitive market for

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2/ The National Wireless Resellers Association ("NWRA"), which later merged with TRA, filed a petition seeking reconsideration of the decision to sunset the resale rule.

3/ See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, WT Docket No. 98-100 et al., FCC 98-134, released July 2, 1998 ("PCIA Forbearance Order") at para. 35 (summarizing benefits of FCC's long-standing wireless resale policy).

full-service packages of telecommunications services -- which will include wireless services.

Smaller Consumers Benefit: Wireless resale is also essential to protect the interests of consumers -- in particular smaller business and individual consumers -- who reap the benefits of wireless resale in terms of lower prices, better customer service, and innovative offerings.

Consumer Choice: Only wireless resellers can provide their customers a choice of multiple underlying networks, each of which has unique advantages and disadvantages from the point of view of each customer.

Low Entry Barriers: Wireless resale also is necessary to keep entry barriers low in the wireless market and in the full-service market that is emerging. Small businesses need resale in order to enter and compete in the provision of telecommunications services, whether providing wireless services only or providing packages that include all telecommunications services.

The continuation of the resale rule will ensure that consumers will continue to enjoy these benefits of resale, regardless of how the wireless market develops. Just as in the long distance market, the resale requirement is a prophylactic rule that ensures that resale will remain available even as the number of facilities-based carriers multiplies. When the market has developed to the point where underlying carriers have strong incentives to deal fairly with resellers, and to treat them as they would treat any other customer, then the rule will have no real effect on the carriers. On the other hand, if a market has not reached that point, or if there is a carrier that for anticompetitive reasons refuses to deal with a reseller competitor, then the rule is there to ensure that the carrier will not discriminate against resellers.

The Commission should eliminate the resale sunset on reconsideration.

II. Prohibition of Direct and Indirect Restrictions on Resale

In its reconsideration order, the Commission must make it clear that, in accordance with the resale rule, it will not tolerate unreasonable restrictions on resale, either direct or indirect, such as a refusal to provide a resale agreement or refusal to provide access to billing data. As the Commission already has held, both *direct and indirect* restrictions on resale are prohibited under the FCC's prior orders:

> [N]o provider may directly or indirectly restrict resale in a manner that is unreasonable in light of the policies stated here. Under this aspect of the rule, an explicit ban on resale is unlawful, *as are practices that effectively (i.e. indirectly) restrict resale*, unless they are justified as reasonable. 4/

TRA has filed in this proceeding the results of surveys of its members demonstrating that most PCS and SMRS carriers are refusing to offer resale agreements. 5/ Many CMRS providers also are refusing to provide access to billing information in electronic format, even when that information is readily available and is provided to the CMRS providers' largest customers. Both of these practices violate the resale rule.

Refusal to Offer a Resale Agreement. Most PCS providers today refuse to provide a resale agreement. Without such an agreement, resellers simply do not

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4/ CMRS Resale Order at para. 12 (emphasis added).

5/ PCIA Forbearance Order at para. 38 and n.114 ("[T]he record contains significant evidence suggesting that despite the current resale rule, abuses in the form of refusals to offer services for resale still exist," citing, inter alia, TRA's July 1997 Survey). See also Letter from Ernest B. Kelly, III, President, TRA, to Chairman William E. Kennard, FCC, attaching 1997 TRA Year End Survey of Wireless Resellers.

have the ability to resell CMRS service. The refusal of a CMRS provider to offer a resale agreement is equivalent to an indirect restriction on resale.

Retail contracts are not appropriate for resellers. Indeed, many retail agreements contain restrictions on resale. To protect both the underlying carrier and the reseller, all cellular carriers have developed resale agreements that provide for such matters as rates, payment terms, volume commitments, allocation of liability, provision of billing information, and termination penalties. 6/ PCS and SMR providers must do the same in order to comply with the resale rule.

Access to Billing Information. Refusal to provide a reseller access to billing information in electronic (or similar) format, when such a format is readily available to the underlying carrier, also violates the prohibition on indirect restrictions on resale. Such a format is essential, as a practical matter, to enable the reseller to generate its own bills. Carriers must not be permitted to discriminate against resellers by denying them access to such electronic billing information.

III. The Need for Enforcement of Existing Resale Requirement

The Commission must make clear in its reconsideration order that it will not tolerate the pattern of noncompliance with its resale requirements that is evident in the wireless industry, particularly among PCS and SMR carriers. As discussed above, there is substantial evidence of noncompliance before this Commission. 7/

The Commission should take strong enforcement action against any CMRS provider that is failing to meet its resale obligations. These enforcement

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6/ Some carriers are willing to offer a sales agent arrangement but refuse to permit resale. Sales agents, unlike resellers, are not true competitors of the underlying carrier. The reseller, unlike the agent, can charge a different (generally lower) rate than the underlying carrier, can offer different terms and conditions of service, and can provide better customer service and billing.

7/ See n. 5, supra.

actions might include (1) expedited action on complaints by wireless resellers; (2) forfeiture proceedings; (3) denial of additional applications for licenses or for renewal of existing licenses; and (4) commencement of license revocation proceedings.

IV. The Need to Re-examine the Wireless Market Before Sunset

As discussed above, TRA strongly urges the Commission to eliminate the sunset of the resale requirement on reconsideration. If the Commission nevertheless decides to retain the sunset, it must at a minimum do two things. First, it must provide in its reconsideration order that the Commission will re-examine the state of wireless resale at some time before the resale obligation is to sunset. If the market has not developed according to the Commission's predictions, the agency will then be in a position to extend the sunset date. Second, as discussed in the next section, the Commission must protect existing customers of resellers from losing service from their chosen provider if and when a sunset takes place.

In its recent decision denying the PCIA request for forbearance from the wireless resale rule, the Commission concluded that market forces have not been sufficient to ensure that carriers will not discriminate against wireless resellers:

> [T]he record contains significant evidence suggesting that despite the current resale rule, abuses in the form of refusals to offer services for resale still exist. [T]hese allegations, which have not been effectively refuted, support our conclusion that the resale rule has not been shown unnecessary to ensure that rates and practices are just, reasonable, and non-discriminatory. 8/

Given these factual findings, it is plain that the Commission must undertake a

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8/ PCIA Forbearance Order at para. 38 (footnotes omitted).

re-examination of the wireless marketplace before it can lawfully eliminate the wireless resale rule. Indeed, in the LMDS context, the Commission recently affirmed its prior conclusion that it would need to re-evaluate the level of competition in the LMDS market before it could permit the scheduled sunset of the eligibility restrictions on ILEC and cable company ownership of in-region LMDS licenses. 9/

V. The Need to Protect Customers From Losing Service

If the Commission decides to retain the sunset of the resale rule, it must make it clear that notwithstanding any contractual provisions in any resale agreements executed before or after the reconsideration order, no CMRS provider may terminate service to any reseller's customers at or after the sunset takes effect. This is necessary to preserve continuation of service to customers from their chosen service provider after the sunset.

A number of carriers have demanded that provisions be included in resale agreements that could permit them to assert the right to terminate service to all of the reseller's customers as soon as the Commission resale rule is lifted. Such provisions, which reflect the underlying carrier's hostility to resale, could be read to permit CMRS carriers to terminate service to every reseller's customers once the

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9/ Specifically, the Commission stated that it would need to conduct a study "examining whether 'there [has been] sufficient entry and increases in competition in the markets at issue . . . for us to be able to sunset the restrictions on incumbent LECs and cable companies.'" Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules, Third Order on Reconsideration, CC Docket No. 92-297, FCC 98-15 (rel. Feb. 11, 1998), at para. 113, quoting Second Report and Order in CC Docket No. 92-297, 12 FCC Rcd 12545, 12633 (para. 198). The Commission held that "the [eligibility] restrictions may be extended if, upon review prior to the [scheduled sunset date], we determine that maintaining the restriction would further promote competition in the local exchange or MVPD [multichannel video programming distribution] market, or both." Third Order on Reconsideration at para. 112, quoting Second Report and Order, 12 FCC Rcd at 12616 (para. 160).

sunset takes place. 10/ Carriers would have strong incentives to terminate a reseller's customers, moreover, because those customers would find it easy (though probably more expensive) to retain service with that underlying carrier.

Wireless resellers today have approximately two million customers. These and future customers should not be put at risk of losing service as a result of the underlying carrier's anticompetitive actions.

In sum, the Commission must make it clear on reconsideration that regardless of any contractual provisions in resale agreements, the underlying CMRS providers may not lawfully terminate service to a customer of a reseller on the ground that the Commission's resale obligation has expired. 11/

10/ Section 202(a) of the Act, 47 U.S.C. § 202(a), also would prohibit a carrier from terminating service to its reseller customers if it does not terminate service to its own retail customers. Nevertheless, to forestall such anticompetitive behavior, the Commission should provide expressly that such a termination of service would violate the Act, regardless of any contract provisions that might be read to permit such termination of service.

11/ We do not here address the question whether Sections 201(b) and 202(a) of the Act, 47 U.S.C. § § 201(b), 202(a), provide an independent basis for requiring a facilities-based carrier to provide service to a reseller in the absence of the Commission's express resale requirement.

Conclusion

For the reasons discussed above and in the NWRA Petition for reconsideration, TRA urges the Commission to eliminate the sunset of the resale requirement. If the Commission retains the sunset, it should fully enforce the resale rule as long as it remains in place, re-evaluate the wireless marketplace before allowing the sunset to take effect, and expressly protect the right of resellers to be free from a cutoff of service to their customers if and when the sunset does take effect.

Sincerely yours,

David Gusky /mo

David Gusky
Vice President and Director of
Wireless Services

Enclosures

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Magalie R. Salas, Secretary
Daniel Phythyon, Chief, Wireless Telecommunications Bureau
John Cimko
Nancy Boocker

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review	)	
Spectrum Aggregation Limits	)	WT Docket No. 98-205
for Wireless Telecommunications Carriers	)	
	)	
Cellular Telecommunications Industry	)	
Association=s Petition for	)	
Forbearance From the 45 MHz	)	
CMRS Spectrum Cap	)	
	)	
Amendment of Parts 20 and 24 of	)	WT Docket No. 96-59
the Commission=s Rules -- Broadband PCS	)	
Competitive Bidding and the Commercial	)	
Mobile Radio Service Spectrum Cap	)	
	)	
Implementation of Sections 3(n) and	)	GN Docket No. 93-252
332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

REPLY COMMENTS
OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: Mary McDermott, Senior Vice President
Chief of Staff, Government Relations

Brent Weingardt, Vice President
Government Relations

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Alexandria, Virginia 22314
(703) 739-0300

Date: February 10, 1999

TABLE OF CONTENTS

SUMMARY

The Personal Communications Industry Association, Inc. (APCIA≅), hereby respectfully submits its Reply Comments in the above-captioned proceeding.

It is clear from a review of the initial Comments that it is too early to alter the existing spectrum cap. The two-way voice market continues to be dominated by cellular carriers, and no commenting party offered any credible evidence to demonstrate otherwise. In its Reply Comments, PCIA supplies additional statistical information demonstrating that PCS operators have a zero market share (measured by subscribers) in 49% of the top 200 markets, and in no top 200 market does the combine total of all operating PCS licensees yet exceed 25% of mobile two-way voice subscribers. Thus, the cellular concentration in every market exceeds the level at which even CTIA admits demonstrates Amarket power.≅

Any alteration of the spectrum cap at this time would dramatically alter the business plans of small PCS operators which are just now building out their systems. More importantly, any change at this time would dramatically impact the PCS auction which the Commission is about to conduct. The spectrum cap has created new competitors, new services and rapid digitization of existing networks. Therefore, PCIA can only conclude that the Commission must not amend, delete or forebear from enforcement of the spectrum cap at this time.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review	)	
Spectrum Aggregation Limits	)	WT Docket No. 98-205
for Wireless Telecommunications Carriers	)	
	)	
Cellular Telecommunications Industry	)	
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CMRS Spectrum Cap	)	
	)	
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the Commission=s Rules -- Broadband PCS	)	
Competitive Bidding and the Commercial	)	
Mobile Radio Service Spectrum Cap	)	
	)	
Implementation of Sections 3(n) and	)	GN Docket No. 93-252
332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS
OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association, Inc. (APCIA≅), through counsel and pursuant to Section 1.415 of the Commission=s Rules, hereby respectfully submits its Reply Comments in the above-captioned proceeding.

The majority of commentors agree with PCIA and urge the Commission to retain its 45 MHz

broadband CMRS spectrum cap.[1] They believe that the cap on local spectrum holdings is the critical catalyst to the creation and expansion of multiple, independent wireless voice networks. PCIA agrees wholeheartedly with the conclusions of Sprint PCS as to the positive impact of the cap.

> The spectrum cap has played and continues to play a critical role in the development, and maintenance, of competition in the mobile telephone market. Because the cap guarantees that there will be at least four facilities-based CMRS licensees in every market, the Commission can adopt "hands off" deregulatory policies toward the CMRS market. This deregulatory policy in turn provides the public with the additional benefits of unfettered competition in the CMRS market, lower prices, innovative services and features, and diverse pricing plans designed to meet the diverse needs of consumers.[2]

The competitive wireless voice market created by the Commission when it authorized PCS is still in its early stages. The comments confirm that it is entirely too early to remove or modify the cap. The Commission should revisit the cap in two years in the next Biennial Review process with a focus on the structure of the market in terms of subscribers and independent networks.

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[1] See, for example, the Comments of America One Communications, Inc.; MCI Worldcom, Inc.; Southern Communications Services, Inc.; DiGiPH, Inc.; Northcoast Communications, LLC; Sprint PCS; Telecommunications Resellers Association; Telephone And Data Systems, Inc.

[2] Sprint PCS Comments at 4.

The concentrated nature of the mobile two-way voice market in terms of subscribers is readily apparent. To date, PCS operators have a zero market share (measured by subscribers) in 49% of the top 200 markets; PCS operators have a 15% or less market share in 82% of the top 200 markets and a 20% or less market share in 96% of the top 200 markets. In no top 200 market does the combined total of all operating PCS licensees yet exceed 25% of mobile two-way voice subscribers.[3] Clearly, cellular operators still dominate. Cellular operators= subscribership levels meet or exceed 35% in each of the top 200 markets reviewed by PCIA; 35% is a level that CTIA has warned could permit a firm to exercise "market power".[4] To lift the cap now would ensure that these concentration levels would only increase, leaving consumers with far fewer choices for independent mobile voice providers.

I. IT IS SIMPLY TOO EARLY TO REMOVE THE CAP

A. The Spectrum Cap Promotes Innovation, Spectrum Conservation And Lower Costs to Consumers

[3]Calculations based on market data provided to PCIA by Telecompetition, Inc. See Attachment A and Section II of this pleading.

[4]CTIA Comments at 6; See also, CTIA Petition at 12. CTIA defines market power as the unilateral power of a firm to raise prices of a good or service.

The comments supporting immediate elimination of the cap are long on claims, but short on specifics.[5] Importantly, there is no concrete evidence demonstrating that any wireless competitor is having any difficulty providing any service in any market due to the cap. In fact, Sprint PCS, the nations largest PCS operator, sees no need to eliminate the cap to promote new service offerings. Nor has any carrier used anywhere near 45 MHz in a market to serve its customers. Sprint PCS goes on to explain that carriers who might be approaching the cap can use second and third generation technology that vastly increases the capacity of their networks without the need to load CMRS spectrum or purchase competing wireless networks.[6] Clearly, permitting large amounts of spectrum (and the accompanying networks) to be held by any one company may permit that company to achieve certain internal efficiencies and increase profits but, it is the public interest which is being considered in the Commission=s review of the spectrum cap, not the interests of individual competitors.[7]

In its Comments, AT&T Wireless Services, Inc. ("AT&T") correctly notes that the Commission is searching for new ways to facilitate competition in the CMRS marketplace. AT&T argues, however, that eliminating the spectrum cap and attribution rules would help realize these

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[5]See, for example, AT&T=s allegation that the attribution rules "...create a disincentive to invest in new wireless services." AT&T Comments at 10-12. AT&T=s sole example is where it could not invest more heavily in three wireless "affiliates" because of the attribution rules. AT&T alleges that this prevents the entities from acquiring capital to build-out the systems. However, elimination of the cap would not provide more capital to these entities for a build-out, it would only result in a sale of the companies before they ever built their respective systems. AT&T=s argument is counter to GTE Service Corp.=s ("GTE") argument that there is sufficient access to capital for smaller systems. GTE Comments at 16.

[6]Sprint PCS Comments at 5, 14-15.

[7]*BellSouth Corporation v. FCC*, No. 97-1630 (1st Cir.) (Jan. 8, 1999).

"ambitious" goals.[8] However, elimination of the cap clearly does not facilitate competition, it only facilitates consolidation. It is the Commission=s task in this proceeding to determine whether there are currently sufficient, established, embedded competitors so that elimination of the cap will not impair a competitive marketplace. The facts clearly demonstrate that the necessary level of embedded competition has not yet been achieved.[9]

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[8]AT&T Comments at n.4.; BellSouth Comments at para. 48. See also, GTE Comments at 22-23; Western Wireless Corporation ("Western") at ii.

[9]See, Section II, infra. Attached to AT&T=s Comments is an analysis performed by Economists Incorporation ("EI"), utilizing for statistical purposes a "market" consisting of 205 MHz of spectrum. However, there are three fundamentals flaws in this analysis. First, as stated in PCIA=s original comments, this type of analysis assumes that all 205 MHz has been constructed, which is far from the case. Second, EI includes narrowband spectrum in its analysis, which is not part of the spectrum cap. Third, EI includes in the relevant market all SMR spectrum. Inclusion of more than the Upper 200 SMR channels in a spectrum cap analysis is flawed because much of the "lower" spectrum is presently occupied by non-CMRS and non-SMR systems, and will become even more saturated with such users after completion of the Upper 200 SMR channel relocation.

The cap has not demonstrably hindered development of new technology or services in any way. Bell Atlantic Mobile, Inc. (ABAM≡), BellSouth Corporation and others argue that new spectrum must be made available to meet the demand for wireless services.[10] PCIA agrees, and as related in PCIA=s initial Comments, PCIA believes that the spectrum cap should not limit the ability of any carrier to participate in these new and exciting markets. The cap should remain for now only with regard to existing broadband, two-way spectrum (consisting of PCS, cellular and SMR spectrum). The cap does not now apply in any other CMRS spectrum bands.

As additional spectrum is made available for additional wireless services and technologies, carriers will have access to this spectrum. Even for broadband two-way spectrum, the cap should be increased proportionately to reflect any new spectrum allocated for these purposes. If the Commission believes that these advanced wireless services are not getting out to the public, it should conduct a follow-on inquiry to its recent Section 706 Report to Congress to consider a new spectrum allocation strategy or removal of other barriers to the dissemination of advanced wireless services.

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[10]BAM Comments at 22-27. BAM=s comparison of the broadband two-way wireless spectrum cap to the lack of similar controls for LMDS is inapposite. The two services do not compete for the same customers, and the services have a different purpose and genesis. BAM=s comparison failed to note the spectrum cap (albeit expressed in a different form).

In fact, the efficiencies in spectrum use and declining prices seen to date are a direct result of the cap. AT&T claims those efficiencies arise because wireless competitors have a "direct economic incentive to maximize output," because "the cost of adding additional subscribers is nearly negligible."[11] However, it is clear that the marketplace competition created by the spectrum cap accelerated the digitization of existing services,[12] and without this competition there would have been no direct economic incentive to maximize output. The success of the broadband wireless two-way market, which has only just begun, is the direct result of the spectrum cap, and that success should not now be sacrificed before embedded competition becomes a reality in this market.

The Commission should take particular note of Sprint PCS=s argument that deployment of second generation equipment makes the spectrum cap less intrusive.[13] The spectrum cap has in fact created additional competitors in a market, which has forced existing competitors to make more efficient with their own spectrum assignments. Without this marketplace pressure, there will no longer be the Adirect economic incentive≅ to utilize the assigned spectrum in the most efficient manner.

Several parties argue that aggregation of spectrum in a single market of more than 45 MHz helps realize economies of scale and scope.[14] However, while there may be economies for the licensee, this only translates into economies for the public if the licensee reduces the price for service. Prices will be driven to competitive levels only if there are embedded competitors in the market, and elimination of the cap at this time will injure competitors= start-up efforts. Where the spectrum cap

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[11]AT&T Comments at n. 33.

[12]The Commission reports that 71% of the United States population is now covered by digital cellular service. *Third Annual CMRS Competition Report* at 30.

[13]Sprint Comments at 12-13.

has been truly shown to be an obstacle in specific situations, the Commission has demonstrated its ability to consider waivers.[15]

[14]See, for example, Comments of Western at 8-9.
[15]See, Comments of Triton Cellular Partners, L.P. (ATriton≅).

B. The Commission is Still in the Midst of Creating New PCS Competitors

Elimination of the cap as the Commission is about to embark on the auction of hundreds of C, D, E and F Block Broadband PCS licenses is particularly inappropriate. The Commission only recently announced auctions for 356 C, D, E and F Block Broadband PCS licenses.[16] The auction is scheduled for March 23, 1999. This auction is primarily aimed at smaller companies who will have an opportunity to obtain spectrum under designated entity rules.[17] These PCS entrepreneurs should not be forced to participate in an auction with so much uncertainty as to the fundamental structure of market. The Commission cannot, in all fairness, leave subject to doubt the fundamental issue of market structure while these entrepreneurs are attempting to assess their cost and profitability scenarios.

Apart from uncertainty as to the cap, C Block designated entities face extraordinary challenges in implementing a PCS business plan. Lifting the cap would radically alter the competitive landscape for these entrepreneurs. Yet, designated entities in the up-coming March PCS auctions - in fact, almost all current designated entity license holders - would be left with no Aexit strategy≅ in the face of these changed circumstances, other than to sell to another designated entity.

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[16]Public Notice, DA-98-204 (rel. December 23, 1998, corrected January 21, 1999).

[17]Several small companies support continuation of the spectrum cap, including America One Communications, Inc., DiGiPH, Inc. and Northcoast Communications, LLC

If the Commission intends to change its designated market structure in such a dramatic way, it must do so well in advance for that spectrum in order for potential bidders to accurately assess the value of auctioned licenses. It would be fundamentally unfair to bidders risking significant sums in reliance on the market structure and competitive outlook engendered by the current spectrum cap to change the rules so dramatically now.[18]

II. THE MARKET FOR MOBILE TWO WAY VOICE SERVICES IS EXTRAORDINARILY CONCENTRATED

As PCIA and others explained in their initial comments, the spectrum cap is still necessary to ensure that emerging PCS competitors have the ability to survive in a market dominated by incumbent cellular operators. Without the cap in this early phase of market development, new PCS companies would have little or no chance to create and sustain independent networks and services that provides consumers with the mobile voice choices favored by the Commission. As Attachment A starkly demonstrates, PCS is still in the early stages of development. In almost 50% of the top 200 MSAs, consumers yet have no alternatives to cellular service. In 53% of these markets, all PCS operators combined have 10% or less of customer share. PCS operators serve as much as 15% of two-way voice subscribers in 82% of the markets and 20% or less of subscribers in 96% of the top markets. PCS providers= combined subscribership share exceeds 20% in only 3% of the top 200 MSAs. In no MSA does the combined PCS operator subscribership share exceed 2% of subscribers. On average, PCS holds a 7.6 percent market share in the top 200 MSAs.

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[18]The pendency of this large auction also shows the nascent status of PCS roll-out. Sixteen percent (16%) of PCS licenses will be auctioned in March and only then will licensees begin network build-out and begin commercial operations.

Cellular operators= dominant position is borne out by estimates from other sources. Based upon recent RCR subscribership estimates, for example, cellular system operators still control the dominant share of the two-way voice market in the very top markets.[19] In each of these top markets, all PCS operators combined have an average subscribership share of only 12 percent. The United States Commerce Department also recognizes that continued predominance of cellular operators, despite the rapid growth of PCS networks.[20]

A. This Market Is Concentrated By Any Measure

The Commission=s spectrum cap is based on the Herfindahl-Hirschman Index (AHHI≅), used by the U.S. Department of Justice to assess the consequences of mergers among competing firms. In 1996 the Commission used an HHI index based on spectrum capacity, rather than market share, to analyze the market and establish a cap at a time when PCS operators had no market share. Now that PCS licenses have been granted and many systems are in operation, it is possible to observe Herfindahl index numbers based on actual market share.

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[19]See Attachment B.

[20]U.S. Industry & Trade Outlook >99, U.S. Department of Commerce/International Trade Administration, at 30-12, 30-13.

At the request of PCIA, Telecompetition Inc. of San Ramon, California provided subscribership estimates for the top 200 markets.[21] PCIA asked HAI Consulting to conduct selected HHI analysis based on the Telecompetition subscriber data in Attachment A chosen from the Top 200 MSA/CMSAs. HAI selected two markets at random from each quartile and computed market share Herfindahl indices for each.[22] The results shown in Table 1 are not surprising. In no case is there an HHI less than 3,000, well above the U.S. Department of Justice threshold for a highly concentrated market.[23] Moreover, in every case, the leading firms have a share that exceeds 35 percent, the level which according to CTIA is A . . . recognized to be necessary for undue market power.≅[24]

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[21]Telecompetition relies on a variety of public data sources, including financial analyst and Commission reports.

[22]Telecompetition provides data for cellular, PCS and SMR/ESMR but does not provide shares for each carrier in each category. HAI assumed that within each category, individual carriers are the same size. Telecompetition uses FCC data to identify markets where PCS carriers have entered. In some cases the FCC data may not reflect the presence of relatively new entrants. These entrants will likely have achieved only a small number of customers so the conclusions reached here would not change.

[23]The HHI=s shown in Table 1 are consistent with those calculated by John B. Hayes and submitted as an attachment to the Comments of Sprint PCS. Although derived from different data sources (thus the values are not identical), the conclusions are inescapably the same - the markets continue to be highly concentrated.

[24]CTIA Comments at 6.

TABLE 1

CSA/MSA Rank	CSA/MSA Name	HHI Score
7	Detroit-Ann Arbor-Flint, MI	3172
38	Salt Lake City-Ogden, UT	3282
61	Harrisburg-Lebanon-Carlisle, PA	4433
93	York, PA	4428
107	Corpus Christi, TX	4437
129	Duluth-Superior, MN-WI	3257
152	Medford-Ashland, OR	4432
191	Altoona, PA	4426

These data show that HHI=s based on current market shares[25] are well above a theoretical floor of 1343, suggesting that the competitive benefits from PCS build-outs are far from fully realized.[26] As additional competitive capacity comes on line, competition in the wireless business will

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[25]HAI has examined two markets where data was available to determine what the impact is on HHI=s due to staggered entry by PCS operators. The number of subscribers ascribed to PCS by Telecompetition has been pro-rated among PCS carriers based on the number of months they have been in service, the results for Detroit and Denver are:

Market	PCS Carriers	HHI without pro-ration	HHI with pro-ration
Detroit	2	3172	3173
Denver	3	3180	3181

The effect of pro-ration appears to be minimal at this time.

[26]HHI of 1343 is based on theoretical capacity of cellular and PCS spectrum in a given market where each cellular carrier has 25 MHz, three PCS carriers have 30 MHz each, three other PCS carriers have 10 MHz each, and an SMR carrier with 10 MHz. Each carrier is presumed independent of the others and spectral capacity equals subscriber capacity. We do not believe it would be appropriate to add other spectrum capacity to this computation. As the Commission has recognized, paging and other spectrum available for other, generally private carrier, mobile services would not allow an adequate substitute for existing cellular, PCS or ESMR spectrum.

increase. On the other hand, mergers or acquisitions involving large firms in local markets could reverse the process by which competition is emerging in wireless markets. Given the current market structure and the lack of demonstrable efficiencies, acquisitions that exceed the existing cap are highly likely to fail antitrust and public interest review.

See *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824 (1996)(A*Spectrum Cap Order*≅). This scenario is consistent with the AAtomized Market≅ presented by the Commission in the *Spectrum Cap Order*. Appendix A of the *Spectrum Cap Order* presented a number of spectrum licensing scenarios and calculated the HHI index for each. The "Atomized Market" provided the lowest index. It is interesting to note that the HHIs in Table 1 are all in the range of those calculated in Appendix A for scenarios where there is no spectrum cap.

The proponents of eliminating the cap argue that the cap is unnecessary given the availability of antitrust and public interest review by the Commission. However, the cap serves a very useful purpose. First, it provides market participants and potential bidders with useful information to the extent that the Commission is unwilling to allow individual markets to be dominated by a single firm or a few very large ones. Second, the cap preserves scarce Commission enforcement resources by eliminating unnecessary merger reviews that would most certainly fail.[27] This also conserves the resources of third parties that would be forced to participate in Commission proceedings in order to protect their interest in a competitive market. This is particularly true for PCS entrepreneurs and designated entities, who would have to divert scarce capital away from network development to oppose mergers on antitrust grounds. The spectrum cap is a cost-effective and pro-competitive substitute for case-by-case Commission review during this period of PCS market development.

At some point, after systems are built and robust wireless competition is well established, it may be reasonable to drop the cap and judge industry consolidation on a case-by-case basis. In the meantime, the cap appears to be a low-enforcement cost rule that is working.[28]

B. The Spectrum Cap is Working

PCIA also asked HAI, Inc. to review the economic analysis of CTIA and other commentors in this proceeding. HAI=s findings are reflected in the following analysis of competition:

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[27]The highly probability of failure would not necessarily deter firms from trying to push the envelope. This is particularly true given that elimination of the cap might be seen by some as weakened resolve on the part of the Commission to enforce the pro-competitive goals underlying the cap.

[28]Where small market overlaps trigger the cap, the Commission could consider exceptions on a case by case basis.

CTIA=s claim that the CMRS market is sufficiently competitive relies principally on a 1993 study by Besen and Burnett, which purports to show that the mobile telephone market was competitive even before PCS carriers entered.[29] While PCIA believes that mobile telephone competition is growing, PCIA does not agree that the market was competitive prior to PCS entry. Returning the two-way mobile wireless market to only two competitors would return the HHI to its previous high level, A... defeating a major purpose of the Commission in creating broadband PCS -- to bring more competition into the concentrated mobile telephony market.≅[30]

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[29]See, Stanley M. Besen and William B. Burnett, AAn Antitrust Analysis of the Market for Mobile Telecommunications Services, December 8, 1993 (ABesen and Burnett≅).

[30]*Spectrum Cap Order* at para. 98.

An analysis conducted by Hatfield Associates, Inc. in 1993 addressed competition in the cellular duopoly in great detail.[31] The reality is that prior to licensing PCS carriers, the cellular market was a capacity-constrained duopoly. Due to a series of mergers among carriers, licenses were concentrated in a small group of firms, implying that firms faced each other in multiple markets. The result was a lack of price competition and high cellular prices and profits.

Although the Hatfield Associates analysis predated the Besen and Burnett paper cited by CTIA, it responded to many of the wireless competition arguments made by Besen in conjunction with other Charles River Associates analysis in earlier papers.[32] Evidence cited by those who believed the market was competitive was faulty. For example, advocates of the competition hypothesis claimed that unstable market shares showed that the market was competitive. In fact, these unstable shares were the result of the head start given to the B license carriers.[33] However, the best evidence

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[31] See, Daniel Kelley, AAn Efficient Market Structure for Personal Communications Services,≅ September 13, 1993, pp. 6-19. This paper was filed by MCI with an *ex parte* presentation in General Docket 90-314.

[32] See, for example, Stanley M. Besen, Robert J. Larner and Jane Murdoch, An Economic analysis of Entry by Cellular Operators Into Personal Communications Services, November 1992.

[33] Both the GSA and the Department of Justice reached the contemporaneous conclusion

that the cellular duopoly was not performing well is the increase in price competition that has occurred since PCS entry, at least in major markets.[34]

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that cellular markets were not competitive. See, Report to Henry Reid, U.S. Senate, Concerns About Competition in the Cellular Telephone Service Industry, 1992. See also, AGAO Witness Tells Senate Panel That Cellular Duopoly Inhibits Competition,≅ Telecommunications Reports, January 18, 1993, p. 17. The Department of Justice cited these findings in its comments supporting the development of PCS. See, U.S. Department of Justice, Reply Comments, General Docket No. 90-314, December 9, 1992.

[34]In the Third Annual CMRS Competition Report the Commission referenced a number of industry reports that showed declining service prices at least in part as a result of competition. Third Annual CMRS Competition Report, at 19-20.

HAI concludes that PCS entry has stimulated a great deal of competition. As a consequence, wireless markets are performing much better than they were before the introduction of PCS. This competition is the result of actual entry by independent firms. The process of introducing competition to wireless markets has not run its course. Many PCS systems, particularly in smaller markets, have not yet been built.[35] Allowing control over spectrum to become more concentrated at this early stage in the development of the market would likely reduce competition.

HAI disagrees with the analysis by the Robert W. Crandall and Robert H. Gertner to the effect that the addition of a single PCS carrier is sufficient to produce fully competitive PCS markets.[36] The market is currently experiencing the rapid growth of new competitors along with the availability of capacity available for new entrants. If the market is allowed to stabilize at a three firm oligopoly equilibrium through acquisitions of new entrants by the incumbents, the recent price competition that Crandall and Gertner document could be reduced or eliminated.[37]

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[35]Indeed, there are 356 returned and reclaimed PCS licenses to be auctioned in FCC Auction #22, scheduled to begin March 23, 1999.

[36]See, Declaration of Robert W. Crandall and Robert H. Gertner, filed with the Comments of Bell Atlantic Mobile, Inc.

[37]PCIA also notes that in 1994 the RBOCs presented statistical and econometric analysis purporting to show that cellular markets were performing competitively prior to the entry of PCS operators. See, Affidavit of Richard S. Higgins and James C. Miller III and Affidavit of Jerry A. Hausman in U.S. v. Western Electric, Civ. Action No. 82-0192-HHG, June 20, 1994 (Bell